

CANADA / JUDGMENT

R. v. Boule

2020 BCSC 1493

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1493 R. v. Boule

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Boule,

2020 BCSC 1493

Date: 20200918

Docket: X081450

Registry: New Westminster

Regina

v.

Robert Joseph Boule

Before: The Honourable Madam Justice Iyer

Ruling on voir dire #1 re qualification

of Deanna Okun-Nachoff as an expert witness

In Chambers

Counsel for the Crown:

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M.J. Gismondi

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 16 and 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2020

Introduction

[1] The defence seeks to qualify Deanna Okun-Nachoff as an expert in the practice, policy, and procedure of immigration law. More specifically, she is to provide opinion evidence on:

[T]he scheme structure of the immigration and refugee law administrative regime in Canada; her practice and experience assisting foreign nationals, refugee claimants, and permanent residents to navigate Canadian immigration and refugee processes; the immigration administrative law practices, policies, and procedures in Canada as they relate to the following: where permanent residents breach their residency obligations; where students fail to continue to engage in activities or breach a term of their study permit; where temporary residents work without authorization; where workers, students, and visitors lose status and/or remain past their authorized period of stay; where refugee claimants breach immigration laws; the mechanisms that individuals in a state of non-compliance can leverage to remediate their situation; and the discretion that is or can be exercised by decision-makers; the refugee claim system/scheme in Canada; the relevant circumstances of perspective refugees who seek to make refugee claims in Canada; how the refugee claim and decision-making process unfolds generally and from the perspective of refugee claimants and immigration law practitioners; the reasons and circumstances in which in-Canada claims are rejected; and the operation or impasse of the Safe Third Country Agreement; the history and background around the Canadian government's decision to repeal the spousal sponsorship living requirements that previously existed under IRPA.

[2] Briefly, Ms. Okun-Nachoff is a lawyer who has practiced immigration law in British Columbia for 18 years. She specializes in ineligibility and inadmissibility cases, including refugee claims and temporary residents who lose status. Most of her clients are vulnerable, in that they have low income, are victims of domestic violence, and/or are refugees. Ms. Okun-Nachoff has extensive experience in these areas of practice and has been active in

public education and advocating for law reform in these areas, including through her work with MOSAIC, the Migrant Workers' Centre of B.C. (formerly Domestic Workers' Association), and the Canadian Bar Association Immigration Subsection.

- [3] The evidence proposed to be given by Ms. Okun-Nachoff consists of her 28-page report ("Report") and the documents to which it refers and the testimony she will give if qualified as an expert in this area. The Crown objects to the admissibility of the report and also to Ms. Okun-Nachoff's qualifications as an expert witness. It challenged the report on eight grounds and produced a copy of the report marked to indicate the paragraphs it considers objectionable. Every substantive paragraph of the report is objected to on one or more grounds.

Legal Test

- [4] The test for admissibility of expert evidence is divided into two stages. First, the evidence must meet the four factors in *R. v. Mohan*, [1994] 2 S.C.R. 9: relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. Second, even if these criteria are met, the trial judge must weigh the potential risks against the benefits of admitting the evidence. (*R. v. Bingley*, 2017 SCC 12 at para. 14, summarizing *Mohan* and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182)

Threshold Test: Mohan Factors

Relevance

- [5] The issues in the underlying Charter application include Parliament's objectives in enacting the impugned sections of IRPA; the reasonableness of the hypothetical examples; the meaning and scope of the impugned sections; and assessment of whether they contravene s. 7 of the Charter as claimed.
- [6] The courts have long recognized the importance of expert evidence in Charter cases. In 1989, Justice Cory wrote, in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at paras. 8 and 9:

Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert [evidence] as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

- [7] This sentiment has been echoed over the years, including by this court in *Crowder v. B.C. (A.G.)*, 2019 BCSC 1824, at para. 37.
- [8] I disagree with the Crown's characterization of portions of the report as irrelevant, bearing in mind the low threshold for relevance set out in *R. v. J.-J.L.*, 2000 SCC 51, at para. 47. For example, in my view, the portion of the report detailing instances of immigration policies defining non-compliance that were adopted and then repealed contributes to the factual context for considering the s. 7 argument.
- [9] It is true that Ms. Okun-Nachoff has no experience with the impugned provisions of the Act. However, they are general offence provisions and the Charter claim is that they are vague, arbitrary, and overbroad because they apply to all contraventions that are not covered by specific offences provisions. Ms. Okun-Nachoff's evidence relates to contraventions to which the impugned provisions could apply. That establishes their threshold relevance.

Necessity

- [10] To be necessary to assist the trier of fact, expert evidence must lie beyond the experience and knowledge of the fact finder; *R. v. J.L.* Opinion on matters of domestic law is unnecessary because that is not the role of the trier of fact and it usurps the role of the trial judge to articulate the relevant law. The Crown objects to significant portions of the report on this basis. I agree that much of the report addresses the law and could be made as a legal submission.
- [11] Evidence about the proper interpretation of a legislative regime is inadmissible because it is legal argument. If it goes to the ultimate issue, it should be treated with great caution. However, to the extent that the evidence animates the court's understanding of how a legislative regime operates on the ground, it is admissible and helpful; *Svangtun v. Pacific National Exhibition*, 2019 BCSC 1542, at paras. 24 to 28; *R. v. Appulonappa*, 2014 BCCA 163, at para. 62.
- [12] Having considered the report in detail, I appreciate that the amount of space devoted to describing the law is, in the author's view, necessary to ensure that the trier of fact appreciates the examples and illustrations provided on each topic. I take into account that this is not a jury case. I am satisfied that I can disabuse myself of those portions of the report that are properly characterized as legal submissions and I will not consider them.

- [13] As I have said, an expert should not opine on the ultimate issue and doing so attracts special scrutiny; *R. v. J.-L.J.*, at para. 37. The Crown identifies a three-paragraph portion in the report where it says Ms. Okun-Nachoff does this. I do not read this passage as opining on any of the issues I identified as ultimate issues earlier in this ruling. I, therefore, do not read the report as opining on the ultimate issue.

Exclusionary rule

- [14] As the Crown agrees there is no applicable exclusionary rule, it is not necessary to consider this factor.

Properly qualified expert

- [15] To be a properly qualified expert, Ms. Okun-Nachoff must opine on matters within her area of expertise and she must be willing and able to provide evidence that is impartial, independent, and unbiased; *Abbey*, 2017, at para. 48.
- [16] Formal training or certification is not required, since a person can become an expert through experience; *Mohan*, at 25; *R. v. Giles*, 2016 BCSC 294, at para. 55. I accept that Ms. Okun-Nachoff has expertise based on her immigration law practice relating to inadmissibility and ineligibility cases including, among other things, those involving refugees, temporary residents, holders of study permits, and/or permanent residents.
- [17] I have reviewed the Crown's objections on this ground. I disagree with the submission that anecdotal examples that are unsupported by academic research, statistical evidence, or "broad spectrum" evidence, such as that of a drug expert in a trafficking case, cannot constitute expert opinion.
- [18] The Crown says that the defence could have tendered such information as factual evidence rather than expert opinion evidence. However, doing so may have required the defence to adduce evidence from a number of witnesses in order to avoid hearsay problems.
- [19] In any event, the case examples provided by Ms. Okun-Nachoff derive from her lengthy specialized immigration practice. In the context of a Charter challenge such as this, they are properly characterized as expert evidence going to social context that informs the court's Charter analysis.
- [20] The Crown submitted that Ms. Okun-Nachoff is not impartial, independent, and unbiased for three reasons: the extent of defence counsel's participation in the preparation of the report; Ms. Okun-Nachoff's use of non-neutral language; and her past and present involvement in advocating for immigration law reform.
- [21] I appreciate that, in making this submission, Crown counsel repeatedly emphasized that he was not casting any aspersions on the expert or defence counsel and was not suggesting that either knowingly acted improperly. I want to assure the parties that I do not understand the Crown to be questioning the integrity of either individual.

- [22] In an earlier ruling, I ordered disclosure of Ms. Okun-Nachoff's expert file, including communications with counsel and draft reports. The Crown argues this evidence shows that defence counsel "collaborated" with the expert to such an extent that the report is a joint effort and, essentially, a legal submission presented in the guise of evidence. The Crown pointed to the instructions the defence provided to Ms. Okun-Nachoff, contained in its application for legal aid funding, and the nature and extent of the comments and edits on the four draft reports. The framework for analysis of this issue is set out at para. 25 of *Surrey Credit Union v. Wilson* (1990), 45 BCLR (2d) 310 (B.C.S.C.).
- [23] On the one hand, an expert opinion is not admissible if it is simply a "reworking of the argument of counsel participating in the case". That situation is exemplified in *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463, at para. 15, where this court characterized a retired tax court judge's expert opinion on the application of tax law to the assumed facts as, effectively, "reasons for judgment of the Federal Court of Appeal". On the other hand, it is entirely proper for counsel to assist the expert with the form rather than the substance of the opinion and to ensure that any objectionable material is removed.
- [24] I have reviewed the instructions, the draft reports, and Ms. Okun-Nachoff's evidence on cross-examination bearing in mind these considerations. She stated unequivocally that she did not understand any of counsel's comments as going to the substance of her opinion. In my view, there is nothing objectionable about the instructions given to Ms. Okun-Nachoff or the comments counsel made on the draft.
- [25] Ms. Okun-Nachoff acknowledged that she reviewed the defence's Charter submission and used it as a guide to structure the report, but failed to include it in the list of sources at pp. 3-4 of the report. However, she expressly refers to those submissions in the body of the report at pp. 9-10. Thus, this is an error of form, not of substance.
- [26] The Crown suggested that Ms. Okun-Nachoff ought to have been given the Crown's Charter argument as well. Even leaving aside the fact that its argument was not filed until two months after completion of the report, there is no obligation on a party to provide the expert with the other side's submissions in order to ensure that the expert is neutral. Ms. Okun-Nachoff is not a court-appointed expert. Accordingly, Ms. Okun-Nachoff is not disqualified as an expert on this basis.
- [27] I reach the same conclusion with respect to Ms. Okun-Nachoff's use of non-neutral language. The Crown pointed to adjectives such as "idiotic", "absurd", and "bizarre" that Ms. Okun-Nachoff uses to describe certain outcomes that she has seen in her practice. For example, at p. 20 of the report, she writes that, "Some people might describe as 'idiotic' the application to refugees of the prohibition on persons entering Canada who intend to settle here permanently unless they have the appropriate visa, because there is no visa available to people who want to make a refugee claim." Ms. Okun-Nachoff acknowledged that this language was not neutral.

[28] In my review of the report, such adjectives are used rarely. I found only one other instance, on p. 12. The use of admittedly strong language in this report does not disqualify Ms. Okun-Nachoff as an expert.

[29] It is clear that Ms. Okun-Nachoff is an active advocate for immigration law reform. That fact alone does not disqualify her as an expert. The question for me is whether the report is essentially advocacy in support of a particular outcome in this case. Disqualification on this basis must meet the high threshold established in *White Burgess* at para. 49:

Similarly, an expert who, in his proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should only occur in very clear cases in which the expert is unwilling or unable to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to the exclusion, but be taken into account in the overall weighing of the costs and benefits of receiving the evidence.

[30] Applying this test, I find that Ms. Okun-Nachoff is not disqualified on this basis.

[31] In conclusion, I find that the report satisfies the Mohan criteria and passes the threshold requirements for admissibility.

Gatekeeping analysis

[32] With all of the foregoing in mind, I must now consider whether the potential risks outweigh the benefits of admitting the evidence such that I ought to exclude it. In *White Burgess*, the Supreme Court of Canada explained how to conduct the analysis at para. 54:

At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

[33] In my view, the potential risks do not outweigh the benefits of admitting the report or hearing evidence from Ms. Okun-Nachoff. The evidence is relevant and necessary. I appreciate that since the decision in *White Burgess* trial judges have been encouraged to exercise more vigilance at the gatekeeping stage. However, that caution has mostly focused on reception of scientific evidence in non-Charter cases. In this case, I am confident that the risks associated with the receiving the expert evidence are minimal and that the frailties identified by the Crown go to weight rather than admissibility.

[34] This is a Charter application in a judge alone trial. The Crown did not identify risks relevant to the gatekeeping analysis that warrant exclusion in this case. Rather, it pointed to the caution in *J.J.L.*, a non-Charter criminal case, at para. 28, that expert evidence "should not

be allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility." However, this passage must be read with the following paragraph, in which the court cautions that, particularly in criminal cases, a court must be extremely cautious in restricting the ability of an accused to call evidence in their defence.

Conclusion

- [35] I find the report admissible. I accept that Ms. Okun-Nachoff is an expert in a more narrowly framed subject area. She is an expert in the areas of immigration law and practice and is qualified to opine on the operation of immigration policy and practice on the grounds relating to inadmissibility and ineligibility of temporary and permanent residents, students, visitors, and refugee claimants, including the policies and practices available to cure or rectify a loss of legal status.
- [36] I am mindful of the concerns that Crown has raised in this qualifications voir dire and will consider them when I assess the weight to be accorded to the report and Ms. Okun-Nachoff's evidence in the Charter analysis. Of course, counsel will also have the opportunity to make full submissions on weight.
- [37] That concludes my decision.

"Iyer J."

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